Source: All Sources > Federal Legal - U.S. > Combined Federal Court Cases > **3rd Circuit - US Court of Appeals, District & Bankruptcy Cases, Combined**
Terms: **"Philadelphia Gear" and "Rule 36"** (Edit Search)

*1992 U.S. Dist. LEXIS 20249, **

RHONE-POULENC RORER INC., and ARMOUR PHARMACEUTICAL CO. v. THE HOME INDEMNITY COMPANY v. AETNA CASUALTY & SURETY CO., et al. v. CITY INSURANCE COMPANY, et al.

CIVIL ACTION No. 88-9752

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 20249

December 28, 1992, Filed; December 29, 1992, Entered

COUNSEL: [*1] For JOHN BARRINGTON HUME & INSCO, Ltd.: by: Louis E. Bricklin, Esq., Illene G. Greenberg, Esq., BENNETT BRICKLIN & SALTZBURG, 1601 Market Street, 11th Fl., Philadelphia, PA 19103.

James W. Christie, Esq., One Commerce Square, 2005 Market Street, Philadelphia, PA 19103.

For THE HOME INDEMNITY COMPANY: BY: Jeffrey B. Albert, Esq., Wendy Fleishman, Esq., Stephanie Resnick, Esq., Timothy D. Mara, Esq., 2000 Market St. 10th Flr., Phila., PA 19103.

For REVLON, INC., and PANTRY PRIDE, INC.: BY: Stephen A. Cozen, Esq., Susan M. Danielski, Esq., Richard C. Bennett, Esq., COZEN AND O'CONNOR, The Atrium - Third Floor, 1900 Market Street, Philadelphia, PA 19103.

For BIRMINGHAM FIRE INSURANCE COMPANY, AIU INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, NATIONAL UNION INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA: BY: Mark A. Dombroff, Esq., John K. Henderson, Jr, Esq., KATTEN MUCHIN, ZAVIS & DOMBROFF, 1275 Pennsylvania Avenue, N.W., Suite 301, Washington, DC 20004.

For AMERICAN CENTENIAL INSURANCE COMPANY: BY: Joseph M. Oberlies, Esq., CONNOR AND WEBER, P.C., Suite 1C47, The Philadelphian, 2401 Pennsylvania**[*2]** Avenue, Philadelphia, Pa 19130.

For AETNA CASUALTY & SURETY INSURANCE: BY: Edward M. Dunham, Jr, Esq., MILLER, DUNHAM, DOERING & MUNSON, 1515 Market St. 13th Flr., Phila., PA 19102.

For LIBERTY MUTUAL INSURANCE COMPANY: BY: WILLIAM C. FOSTER, ESQ., GERARD F. LIPSKI, ESQ., 1700 Atlantic Bldg., 260 South Broad St., Phila., PA 19102.

For AIU INSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY: BY: B. Alan Dash, Esq., H. Marc Tepper, Esq., Mary J. Davis, Esq., MARGOLIS, EDELSTEIN, SCHERLIS SAROWITZ AND KRAEMER, The Curtis Center, 4th flr., Independence Square West, Phila., PA 19106-3304.

For HARTFORD INSURANCE COMPANY, TWIN CITY INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY and NEW ENGLAND INSURANCE COMPANY: BY: James Young, Esq., STRADLEY, RONON, STEVENS & YOUNG, 2600 One Commerce Square, Phila., PA 19103.

For NORTH STAR REINSURANCE CORPORATION: BY: DENNIS R. SUPLEE, ESQ., RONALD P. SCHILLER, ESQ., SCHNADER, HARRISON, SEGAL & LEWIS, 1600 Market Street, Suite 3600, Phila., PA 19103.

For FIREMAN'S FUND INSURANCE**[*3]** COMPANY: BY: Wayne Partenheimer, esq., Suite 620, The Curtis Center, 6th & Walnut Sts., Phila., PA 19106.

For THE HOME INDEMNITY COMPANY, HOME INSURANCE COMPANY, CITY INSURANCE COMPANY: BY: James W. Christie, Esq., One Commerce Square, 2005 Market Street, Philadelphia, PA 19103.

For HARTFORD INSURANCE COMPANY, TWIN CITY INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, NEW ENGLAND REINSURANCE AND NEW ENGLAND INSURANCE COMPANY: BY: Daniel T. McWilliams, McWILLIAMS AND MINTZER, P.C., Eight Penn Center, 20th Floor, 1628 J.F.K. Blvd, Philadelphia, PA 19103.

JUDGES: NAYTHONS

OPINIONBY: EDWIN E. NAYTHONS

OPINION: MEMORANDUM AND ORDER

This matter is before me upon the Motion to Compel Answers to Requests for Admissions and Interrogatories ("the motion") of third party defendant Republic Insurance Company ("Republic"). Although the motion was originally filed against plaintiffs Revlon Pharmacuetical Co. ("Revlon"), Rhone - Poulenc Rorer, Inc. ("RPR"), and Armour Pharmaceutical Co. ("Armour"), the motion is now directed solely at Revlon. n1 In addition, negotiation with Revlon has reduced the number of Requests for Admissions ("RFAs") in dispute to approximately 95, and the number of interrogatories to two**[*4]** (2).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Through independent negotiation among the parties, the motion was resolved among Republic, RPR, and Armour. On October 23, 1992, Republic withdrew the motion as against RPR and Armour.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

The admissions which Republic seeks to compel have been divided into several groups by the parties. The first group is described by Republic as those requests to which Revlon's Response was based upon a 'general statement' which improperly asserted that Revlon could refuse to conduct reasonable inquiry and answer responsively." Republic's Reply Memorandum, Tab 1 at 3. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 This group is composed of requests for admissions nos. 28-30, 33-46, 53-543, 57-60, 62-66, 76-77, 80-82, 88-90, 93, 96-97, 99-112, 115-116, 118, 123, 125-126, 128, 133-138, 143-148, 150-155, and 191-192 of the first set of requests for admissions; and nos. 1-9 and 11 of the second set of requests for admissions.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**[*5]**

Revlon's "general response" reads as follows:

Although Armour and Plasma Alliance were subsidiaries of Revlon until January 6, 1986, each was a separately incorporated entity. Revlon's activities and knowledge cannot be imputed to Armour or Plasma Alliance, and Armour or Plasma Alliance's activities and knowledge cannot be imputed to Revlon. After January 6, 1986, Revlon had no interest in Armour or Plasma Alliance or in any former members of its Ethical Products Division. Revlon is not a participant in that industry since January 6, 1986. In addition, Revlon is not in possession of the vast majority of the corporate records or other sources of information that are available to Armour and Plasma Alliance, and Revlon has had no access to such records since the sale of these two companies in January of 1986. As a result, Revlon is without present knowledge or information sufficient to frame a response to many of the Requests even when they relate to the period during which Revlon owned the companies. Where a Request is inapplicable to Revlon for the reasons stated above, it is denied. Where, because of the facts stated above, Revlon lacks sufficient information to admit or deny**[*6]** a Request, it is denied.

Revlon's Answers to the First Set of Requests for Admission at 6-7.

In answer to each of the requests for admission listed in this first group, Revlon responded, "Denied. See General Response." Revlon's reliance on this "general response" is misplaced. Federal Rule of Civil Procedure 36 governs the propounding of requests for admission. That rule states in pertinent part, "The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." By relying on their general response in answering these interrogatories, Revlon makes it unclear whether their response is intended as a denial of the request or an inability to truthfully admit or deny the request. Revlon cannot simply assert that their inability to admit or deny equates to a denial, for Fed.R.Civ.P. 36(a) sets forth specific tests which must be met before a party may claim an inability to admit or deny.

Rule 36(a) states, "[an] answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information**[*7]** known or readily obtainable by the party is insufficient to enable the party to admit or deny." Revlon has failed to state that reasonable inquiry was made in answering any of the requests in the first group. To the contrary, Revlon's blanket denial strongly indicates that the substance of the requests was given little, if any, consideration. Revlon had an obligation to perform a reasonable inquiry as to the facts alleged in each request for admission before stating that it cannot admit or deny any request.

This inquiry is limited to not only Revlon's own resources, but to those of its codefendants as well. See Al-Jundi v. Rockefeller, 91 F.R.D. 590, 593 (W.D.N.Y. 1981). In Al-Jundi, the Court specifically stated that the defendant's request to "limit the scope of the requests for information that might reasonably be expected to be within the knowledge of the defendant" asked too much. Id. The Court reasoned that "because **Rule 36** admission requests serve the highly desirable purpose of eliminating the need for proof of issues upon trial, there is strong disincentive to finding an undue burden where the requested party can make the necessary**[*8]** inquiries without extraordinary expense or effort." Id. at 594. The Court held that pursuant to Fed.R.Civ.P. 26(c), a party claiming that inquiry into the facts behind a request for admission would be overburdensome, that party must show that the burden would be undue in light of all the circumstances.

In order to facilitate the purposes behind **Rule 36**(a), "a party upon which a Request for Admission is served must make a good faith effort to obtain information so he can admit or deny the request." United States v. Nicolet, No. 85-cv-3060 Slip Op. at 2 (E.D. Pa. May 12,

1989) citing Alexander v. Rizzo, 52 F.R.D. 235, 236 (E.D. Pa. 1971). This reasonable inquiry entails at least a limited obligation to inquire of co-defendants, but not non-parties. Dubin v. E.F. Hutton Group, 125 F.R.D. 372, 374-5 (S.D.N.Y. 1988). Here, Revlon had access to co-defendants Armour and Plasma Alliance, not only because they are former subsidiaries of Revlon, but because they are currently wholly owned subsidiaries of co-defendant RPR, who is represented by the same counsel as Revlon. Clearly, to make inquiries**[*9]** of Armour and Plasma Alliance concerning the requests for admissions would not be an undue burden on Revlon in this case.

Revlon's argument that the admission requests seek to impute to Revlon facts known by Armour and Plasma Alliance does not appear relevant. If whether or not Revlon knew what Armour and Plasma Alliance knew is a key issue in the case, it is one that will be decided at trial, and not by a unilateral "general response" by Revlon. As discussed above, Revlon's statement that it has no knowledge of the actions of Armour or Plasma Alliance at any point in time does not excuse Revlon from attempting reasonable inquiry from these two co-parties. Furthermore, Revlon's statement that any requests which Revlon can neither admit nor deny will be denied directly contravenes the explicit language of **Rule 36**(a). **Rule 36**(a) specifically states that if a party is unable to admit or deny a request, it must state that it has made reasonable inquiry and that "the information known or readily obtainable by the party is insufficient to enable the party to admit or deny". Revlon's answers which cite only the general response are incomplete and in violation of **Rule 36**(a).

In addition, **[*10]** Revlon claims that the sole purpose of the admission requests is to 'pierce the corporate veil'. This argument is also not applicable. Even if the admissions do lead to an inadmissible attempt to pierce the corporate veil, requests for admissions are, Revlon's definitions aside, 'discovery tools' subject to Fed.R.Civ.P. 26(b). n3 See 1970 Advisory Committee Notes to Fed.R.Civ.P. 36(a). The question is not admissibility, but relevance. If the requests are reasonably calculated to lead to the discovery of admissible evidence, that is sufficient to compel an answer.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 Revlon relies to a large extent on this Court's Memorandum and Order in Ghazerian v. United States, 1991 Westlaw 30746 (E.D. Pa. 1991). This Court did indeed characterize **Rule 36** as "not properly a discovery device." However, the Advisory Committee notes to the 1970 Amendment to **Rule 36**(a) state that "a request may be made to admit matters within the scope of Rule 26(b)." That Rule of course, allows for the discovery of any matter relevant to the issues in the case, whether admissible at trial or not. Thus, although not properly a "discovery tool," there is no requirement either in **Rule 36** or in my opinion in Ghazerian that RFAs be used only "after discovery has been taken" as Revlon claims on page 2, note 1 of their Response.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**[*11]**

Relevancy is to be broadly construed for Rule 26(b) purposes and is not limited to the precise issues set out in the pleadings or to the merits of the case. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). Rather, discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action. As a result, discovery rules are to be accorded broad and liberal construction. Buffington v. Gillette Co., 101 F.R.D. 400 (W.D. Okla. 1980). See also Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, at 124 (M.D.N.C. 1989).

Additionally, Revlon is free to make any pertinent objections to the admission of any responses to the requests at trial. Goldman v. Mooney, 24 F.R.D. 279 (W.D.Pa. 1959). In fact, Revlon specifically reserved the right to do so in its general objections. Further, asking

Revlon questions about Armour does not automatically transfer liability from Armour to Revlon as the response suggests. Deposition testimony cited in Revlon's brief indicates that they had some**[*12]** managerial and financial oversight of Armour and Plasma Alliance. n4 Regardless of whether this oversight is enough to make Revlon liable is simply irrelevant to whether or not Revlon knew of individual employees or activities of Armour. Revlon objects to the use of the word "you" to indicate both Revlon and Armour. Although Revlon views this usage as an attempt to 'pierce the veil', since the requests submitted to Armour and Revlon are identical, it was more likely a matter of convenience. If Revlon did not know the truth of the information presented in the RFAs, and could not determine the truth after reasonable inquiry, all the rules require is that it so state in response to the RFAs.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 In fact, in response to Request for Admissions no. 70, Revlon admitted that it "provided various integrated staff services and management oversight and coordination to those entities." It is apparent that Revlon had some knowledge concerning Armour during the time of its ownership.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Revlon's argument that Republic is using **[*13]** the RFA's for an improper purpose is also specious. Revlon implies that the sole purpose of Requests for Admission is "to narrow the issues for trial to those which are genuinely contested." Revlon's Memorandum in Opposition at 5, citing United Coal Cos. v. Powell Construction Co., 839 F.2d 958, 967 (3d Cir. 1988). However, the Third Circuit's ruling in United Coal is taken out of context. The Court was not engaging in an analysis of "Admissions" law generally, but was discussing only those admissions before them, which dealt solely with trial issues. It is clear however from the 1970 Advisory Committee notes that an equally important purpose of serving requests for admissions is to facilitate proof as to issues which cannot be eliminated from the case and any matter within the scope of rule 26(b) that relates to statements or opinions of fact or of the application of the law to facts. See also **Philadelphia Gear** Corp. v. Techniweld, Inc., No. 90-cv-5671 Slip Op. at 2 (E.D. Pa. May 1, 1992); United States v. Nicolet, Inc., No. 85-cv-3060 Slip Op. at 2 (E.D. Pa. May 12, 1989).

Revlon also objects to the form of the Requests, stating that**[*14]** they are too complex and compounded. It should be noted that Revlon did not raise this objection, either specifically or generally, in responding to any of the requests in the first group. This objection is therefore waived. In addition however, the Federal Rules do not contemplate that each request for admission must be phrased so that the answering party can respond with either a simple "admitted" or "denied". The language of the rule itself indicates that requests may require more than a simple "yes or no" answer. The Rule states: "[a] denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder." The plain language of the rule gives a party two options in responding to complex requests for admissions; either deny those parts of the request which are untrue and admit the rest, or object to the interrogatory.

In addition, parties may not state that any matter not specifically admitted or denied shall be deemed denied on the ground that it is irrelevant, inaccurate, **[*15]** argumentative, or because the answering party has no competent knowledge of said statement. Fed.R.Civ.P. 36(a). By its general response, Revlon essentially deems denied all the interrogatories in the first group because they have no knowledge of the facts alleged in the requests for admission. This is improper. Revlon has clearly made no attempt to properly respond to the RFAs and, as discussed above has not even attempted to make reasonable inquiry.

Therefore, this Court will deem admitted the following Requests for Admissions: n5 Nos. 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 53, 54, 59, 60, 62, 63, 64, 65, 66, 76, 77, 80, 81, 82, 88, 89, 90, 93, 96, 97, 99, 100, 101, 102, 103; 104, 105, 106, 107, 108, 109, 110, 111, 112, 115, 116, 118, 123, 125, 126, 128, 133, 134, 135, 136, 137, 138, 143, 144, 145, 146, 147, 150, 151, 152, 153, 154, and 155 of Republic's first set of Requests for Admissions, and Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of Republic's Second Set of Requests for Admissions.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 Because this Court agrees with Revlon's objection that the term "in substance" as used in RFA Nos. 57 and 58 is vague, the motion will be denied as to those requests. In addition, although RFA No. 148 is listed in the first group, Revlon's answer to this request does not refer to the general response. Thus, it will be discussed elsewhere in this opinion. In addition, RFAs No. 191 and 192 were objected to for reasons other than those cited in the general response, and will be discussed infra.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**[*16]**

The Remaining RFA's

Also at issue in Republic's motion are the responses of Revlon to twelve other RFA's from the first set of Requests. Request no. 94 asked Revlon to admit or deny that: "Dr. Rodell was an agent or servant of Armour from Approximately March, 1983 through at least August 9, 1989." Similarly, request no. 119 asked Revlon to admit or deny: "As of May 9, 1983, Dr. Rodell was an agent or servant or Armour."

Revlon's response to Request no. 94 was as follows:

Denied as stated. Revlon incorporates its General Response. It is admitted only that Dr. Rodell was employed as Armour's Vice President, Regulatory and Technical Affairs, from March, 1983 until Revlon's divestiture of Armour in January 1986.

Revlon's Response to Request no. 119 simply referenced the above response to no. 94.

Again, Revlon's referencing of their 'general response' is improper. Revlon did make an admission somewhat responsive to the RFAs, however, under **Rule 36**, any denial of an RFA must be made with 'specificity'. If Revlon seeks to admit part of the RFA and deny part, it may do so. Likewise, if after reasonable inquiry Revlon is unable to admit or deny the request, it must so state. Because**[*17]** Revlon did make a partial answer to these RFAs, it will be given leave to amend the answers to conform with **rule 36**(a).

Requests Nos. 47 and 61 ask Revlon to admit or deny that copies of two documents are true and correct. Revlon denied the requests, and then noted that since the documents were created by another agency, Revlon has no knowledge as to its authenticity. As previously discussed, a party may not deny an interrogatory because it lacks sufficient information to admit or deny. A party must make reasonable inquiry before it may state that it is unable to admit or deny a request. Therefore, these requests will be deemed admitted.

Republic claims that Revlon's response to request no. 25 was evasive. Request No. 25 asks Revlon to admit or deny that:

At least from January 1, 1982, through April 1, 1985, the duties and regular practices of some or all of the physicians and scientists referred to in the preceding request included keeping themselves informed on the current state of medical and scientific knowledge relevant to the products you manufactured, including medical and scientific knowledge pertinent to blood-borne diseases that can be transmitted through blood **[*18]** products such as blood clotting factors.

Revlon objected to RFA no. 25 on the grounds that it did not "separately set forth" each matter to be admitted, and because the phrase "some or all . . . physicians and scientists" was vague and ambiguous. This Court agrees that the phrase "some or all" is overly vague and ambiguous. While the federal rules require a party from whom admissions are sought to qualify an admission where necessary, there is no burden on that party to qualify the RFA itself. Revlon cannot possibly respond to this request without qualifying the "some or all" phrase. Thus, the RFA is improper and the motion shall be denied as to No. 25.

Request no. 26 asks Revlon to admit that:

At least from January 1, 1982 through April 1, 1985, the physicians and scientists employed by you kept themselves informed of medical and scientific knowledge relevant to diseases that can be transmitted through blood products by various means, including meetings with government officials, scientific and health oriented groups, and review of medical, scientific and other publications.

Revlon objected to the admission on the grounds that it did not "separately set forth" each matter **[*19]** for which an admission was sought, and because the terms "various means", "government officials", and "medical, scientific and other publications" are vague and ambiguous. This Court is inclined to agree. It would be difficult for Revlon to admit this request without specifying which means, officials, and publications Revlon did make use of, if any. Were Revlon to admit this request, it would likely be prejudiced by the vague scope of the admission. **Rule 36**(a) does not contemplate parties admitting any information not included in the RFA. As this Court has previously held, RFA's are to be used to elicit the admission of facts of which the requesting party is already aware. Ghazerian v. United States, 1991 Westlaw 30746 at 2 (E.D. Pa. 1991); citing 8 C. Wright & A. Miller, Federal Practice & Procedure s 2253 (1970). Therefore, Republic's motion will be denied as to RFA no. 26.

In contrast, Revlon objects on essentially the same grounds to RFA no. 87 which states: "On or about January 4, 1983, a meeting ("the January 4, 1983 meeting") was held at CDC." Revlon claims that this request is also "overbroad, vague, and ambiguous, because it does not identify a specific meeting held**[*20]** at the CDC on that date." It is unclear exactly how Republic would go about "identifying" such a meeting, other than giving the date on and location at which it was held. The request is specific enough. However, because Revlon followed proper procedure in objecting to the request, leave will be given to amend the response to this request.

Republic also seeks to compel an admission to RFA no. 121 which states:

Dr. Rodell's May 9, 2983 memorandum, referred to in Request no. 118, described the discussions that occurred at the May 4, 1983 meeting concerning the transmission of AIDS through blood and blood products.

Republic claims that Revlon's answer was evasive. However, although unorthodox, Revlon's response was complete, but not in precise conformity with **Rule 36**. Revlon clearly admitted certain parts of the request and denied other parts. However, in the interests of consistency and compliance with the Federal Rules of Civil Procedure, Revlon will be ordered to amend its response to conform with the language of **Rule 36**(a). n6

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Revlon's final sentence in its response is: "By way of further response, the memorandum, being a writing, speaks for itself." This is a wholly inappropriate response to a request for admission. Requests for admissions are different from interrogatories. A party is not free to simply refer to other material, but must admit, deny, deny in part and admit in part, or state that it is unable to admit or deny the statement.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**[*21]**

Request no. 148 asks Revlon to admit that "Before April 1, 1985, one or more federal health agencies released a study in which 90 percent or more of the severe hemophiliacs tested were positive for HIV." Revlon objected to this request on the grounds that much of the language was vague, and that no documents were attached to clarify this request. Revlon argues that "because Revlon identified the ambiguities that prevented it from responding, the burden was on Republic to clarify its request." However, this Court is unable to determine what is ambiguous about the request. Either Revlon has knowledge of one or more studies which found that 90 percent or more of sever hemophiliacs tested were positive for HIV, it has knowledge that no such studies were conducted, or it has no knowledge on the subject at all, even after reasonable inquiry. Revlon can respond to the request as stated and will be ordered to amend its answer to do so. n7

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 Revlon's complaint that Republic did not attach a copy of any documents is irrelevant. A party serving Requests for admissions ". . . need not, and ordinarily should not, state the basis or source of the information." 4A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice (2d ed. 1989) P 36.05[2].

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -**[*22]**

Revlon's objections to RFAs nos. 184 and 185 are inapposite. The requests ask Revlon to admit respectively that:

Any information concerning the risks of HIV infection or AIDS associated with the use of blood clotting factors, which was in the possession of or known to Armour or its agents or servants at any time between January 1, 1982 and April 1, 1985, would have been available to Revlon or its agents or servants at the same times that it was known to or in the possession of Armour.

and

Any information concerning the risks of HIV infection or AIDS associated with the use of blood clotting factors, which was in the possession of or known to Plasma Alliance or its agents or servants at any time between January 1, 1982 and April 1, 1985, would have been available to Revlon or its agents or servants at the same times that it was known to or in the possession of Plasma Alliance.

Revlon objected to these requests on the grounds that they involve a "purely legal issue and [are] therefore not a proper subject of a Request for Admission." However, it is apparent to this Court that the admissions call for, at most, an application of law to fact. Republic simply asks Revlon to **[*23]** admit that it had access to facts which Armour and Plasma Alliance possessed concerning certain subjects. While this may be relevant to an issue of law in the case, it is hardly a purely legal issue. The application of law to fact is a perfectly acceptable matter of which to request an admission. See 1970 Advisory Committee Notes to **Rule 36** (a); Langer v. Presbyterian-Universtiy of Pennsylvania Medical Center, 1988 U.S. Dist. LEXIS

5105 at 4 (E.D. Pa. June 1, 1988); Fed.R.Civ.P. 36(a). That such an admission could lead a court or factfinder to come to a legal conclusion is not a ground for objecting to the interrogatory. See 1970 Advisory Committee Notes. If, as Revlon belatedly suggests on page 16 of its answer to the motion to compel, the statements are incorrect, Revlon only had to so state. These requests for admissions are proper, and Revlon's objections are without merit. Therefore, Nos. 184 and 185 shall be deemed admitted.

The final RFAs at issue are Nos. 191, 192, and 193 which refers to some 60 documents which were the subject of request no. 187. Number 193 asks Revlon to admit that:

Separately, with respect to each document listed**[*24]** in [RFA no. 187] which is listed in the description thereof of in the request, as having been sent to any person who was at any time an agent or servant of Rorer, Armour, Plasma Alliance or Revlon (including, but not limited to, a person listed under "to", "cc", "bcc", or "list" in the description of the document), admit that each such person received the original or a copy of the document on or about the date appearing on the document.

Revlon objected to the interrogatory as not separately presenting each matter to which an admission is requested, and also stated that they could not admit or deny the request because they have no way of knowing whether all such correspondence was received, who received it, or when it was received.

Revlon's objections to this interrogatory are well founded. The admission not only requires Revlon to admit or deny certain facts, but also to review each document; determine which, if any of the people mentioned were employees at any time of Revlon, Armour, or Plasma Alliance, and then make inquiry of those individuals as to whether they received the document and when. Clearly, the RFA does not separately set forth each matter to be admitted. The**[*25]** proper method of propounding this interrogatory would have been for Republic to Separately list each document, and each alleged recipient as to whom they sought an admission. As phrased, it is impossible for Revlon to admit or deny the request because of the failure of Republic to properly set forth its request. Revlon's objection will be sustained, and the motion to compel denied as to request for admission No. 193. For the reasons discussed above, the motion will also be denied as to RFA Nos. 191 and 192.

The Interrogatories

In addition to the Requests for Admissions discussed above, Republic also seeks to compel answers to interrogatories nos. 1 and 2 of Republic's First Set of Interrogatories. Interrogatory No. 1 asks:

As to each and every response which you gave to Republic's First Set of Requests for Admissions, in which you denied the request in whole or in part:

a. State the basis for your denial.

b. Identify each and every person whom you consulted in determining how to respond to the request; and,

c. Identify each and every document that you reviewed in the course of determining how to respond to the request.

Revlon objected to this interrogatory as a violation**[*26]** of the work product doctrine, the attorney-client privilege, "or other applicable privileges", and on the ground that the interrogatory is unduly burdensome. By failing to specifically identify any attorney-client communications, Revlon has waived that privilege. A party claiming work product protection or asserting the attorney-client privilege has the burden of establishing that the material sought to be protected falls within the doctrine. Conoco Inc. v. United States Department of Justice, 687 F.2d 724, 730 (3rd Cir. 1982). A proper claim of attorney-client privilege requires a specific designation and description of the documents within its scope, as well as precise and certain reasons for preserving their confidentiality. International Paper Co. v. Fireboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974). It is incumbent upon one asserting the privilege to make a proper showing that all of the elements of the privilege are present. Barr Marine Products Co., Inc. v. Borg Warner, 84 F.R.D. 631, 636 (E.D. Pa. 1979). Both International Paper and Barr Marine Products require that a party**[*27]** claiming attorney-client privilege must submit an affidavit which shows sufficient facts as to bring the identified and described documents within the confines of the privilege. In the instant matter, Revlon has not only failed to file such an affidavit, but has also failed to submit copies of the privileged material, or even identify such material to the Court. Therefore, Revlon has waived any claim of attorney-client privilege. By failing to specifically identify what "other privileges" are referred to, Revlon has waived those.

Revlon's objections that the information sought is protected work product is likewise inapplicable. Revlon relies on Sporck v. Peil, 759 F.2d 312 (3rd Cir. 1985), in which the Third Circuit Court of Appeals held that the specific grouping of documents an attorney uses in preparing a witness for deposition, even though not individually attorney work product, can constitute the legal opinion or strategies of the preparing attorney. However, Sporck is not applicable to the instant dispute. In Sporck, plaintiff's counsel sought documents used in preparing the defendant for a deposition. Such trial preparation is clearly**[*28]** protected work product under Fed.R.Civ.P. 26(b)(3). That Rule states in pertinent part:

. . . [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing of that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

However, in the instant case, Republic seeks information on the response to a pleading. Work product includes an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and inferences drawn from interviews of witnesses, as well as documents authored by the attorney discussing the facts of the case. Sporck v. Peil, 759 F.2d at 316. In the instant case, counsel is asked only to identify what information he relied on in affirming or denying a statement of fact. This goes neither to trial strategy nor evaluation of the case. Furthermore, **[*29]** since no production of materials is requested, Rule 26(b)(3) is inapplicable since no "documents" or "tangible things" are at issue. n8 The information requested in interrogatory no. 1 does not constitute work product.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 Revlon does not allege that the documents which Republic asks them to identify are work product, but claims that their reliance on those documents is itself work product. Because such reliance was only to admit or deny factual statements, it does not constitute the strategies, opinions, or thoughts of counsel.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Revlon's final argument is that the interrogatory is overburdensome. This Court is inclined to agree. In fact, the interrogatory constitutes an abuse of the discovery process. Republic asserts that it is entitled to information concerning every source Revlon relied on or even referenced in answering the requests for information. The veracity of the admission requests is not a discoverable issue. Republic's arguments concerning a "remedy" for false answers aside, nothing in **Rule 36** indicates**[*30]** that a party has an obligation to defend its answers to requests for admissions. Indeed, to do so would interminably clog up the discovery process and moot the purpose of requests for admissions, which is to narrow the issues and decrease the number of matters for which proof is required. See United Coal Cos. v. Powell Construction Cos., supra; 1970 Advisory Committee Notes to **Rule 36**(a). **Rule 36** specifically states that a party must qualify any answer which denies only part of an RFA, and must make reasonable inquiry before alleging a failure to admit or deny. However, a party has no obligation under **Rule 36** to qualify a denial in any way. Further, granting Republic's motion and compelling an answer to interrogatory no. 1 would create a significant risk of forcing a mini-trial in the discovery stage concerning largely collateral issues. The information Republic seeks is beyond the scope of the issues in the case, and not relevant discovery. The motion is denied as to interrogatory no. 1.

The final issue before this Court is Republic's attempt to compel a response to interrogatory no. 2. This interrogatory asks Revlon, as to each RFA answer in which**[*31]** they denied sufficient knowledge to admit or deny, to describe the inquiry engaged in prior to answering, identify every person consulted, every document reviewed, every person who may have information relevant to the request, every person not consulted who might have information, and every document not reviewed which might contain information. For the reasons discussed above, this interrogatory is inappropriate. Republic claims that because **Rule 36** requires an answering party to . . . deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.", the interrogatory is well beyond the scope of **Rule 36**. This Court knows of no authority for the proposition that a party is required to write a brief in support of each instance in which it cannot admit or deny an RFA. However, subpart "a" of the interrogatory asks Revlon to "describe in detail the inquiry in which you engaged prior to determining that you lacked sufficient knowledge or information to answer the interrogatory." This subpart nearly duplicates the language of the rule. Thus, the motion will be granted as to subpart "a" of interrogatory no. 2, and "denied as to the**[*32]** remainder of the interrogatory.

ORDER

NOW, this 23rd, day of DECEMBER, 1992, after consideration of third party plaintiff Republic's motion to deem admitted certain requests for admissions and the opposition thereto, it is hereby ORDERED that:

1. The motion is GRANTED IN PART and DENIED IN PART.

2. The following Requests for Admission are deemed admitted by plaintiff and third party defendant Revlon Pharmaceutical Company: 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 53, 54, 59, 60, 61, 62, 63, 64, 65, 66, 76, 77, 80, 81, 82, 88, 89, 90, 93, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 115, 116, 118, 123, 125, 126, 128, 133, 134, 135, 136, 137, 138, 143, 144, 145, 146, 147, 150, 151, 152, 153, 154, 155, 184, and 185 of Republic's first set of Requests for Admissions; and Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of Republic's second set of Requests for Admissions.

2. Revlon will be given leave to amend its answers to Requests for Admissions Nos. 87, 94, 119, 121, and 148 consistent with this Memorandum and Order and Fed.R.Civ.P. 36.

3. The motion is DENIED as to Requests for Admissions Nos. 25, 26, 191, 192, and 193; **[*33]** and as to Interrogatories Nos. 1 and 2 of Republic's first set of Interrogatories.

EDWIN E. NAYTHONS
U.S.M. JUDGE

Source: All Sources > Federal Legal - U.S. > Combined Federal Court Cases > **3rd Circuit - US Court of Appeals, District & Bankruptcy Cases, Combined**
Terms: **"Philadelphia Gear" and "Rule 36"** (Edit Search)
View: Full
Date/Time: Monday, September 12, 2005 - 2:14:15 PM EDT

Products & Services | LexisNexis Bookstore | LexisNexis by Credit Card | Feedback | Sign Off | Help
About LexisNexis | Terms and Conditions | Support Identifier

Copyright © 2004 LexisNexis, a division of Reed Elsevier, Inc. All rights reserved.